Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1489

STATE OF NEW JERSEY,

Petitioner,

v.

JOSEPH S. PORTASH,

Respondent.

On Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinions Below

The following opinions of the state courts were previously reproduced in the appendix to the Petition for Certiorari: the Orders of the Supreme Court of New Jersey denying certification and dismissing the appeal, reported at 75 N.J. 597, 384 A.2d 827 (1978); the opinion

of the Superior Court of New Jersey, Appellate Division reported at 151 N.J. Super. 200, 376 A2d 950 (1977), and the unreported judgment of conviction of the Superior Court of New Jersey, Law Division.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on January 17, 1978, and the petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. May a defendant invoke the benefit of the privilege against self-incrimination without having properly asserted it at trial?

2. Does the privilege against self-incrimination shield a defendant from impeachment of his trial testimony with his materially inconsistent statements given after he was granted immunity?

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment V

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *

New Jersey Public Employees Immunity Statute, N.J.S.A. 2A:81-17.2a2[1].

[1] The statute was subsequently amended, L. 1975, c. 246 §2, to alter its self-executing nature.

> If any public employee, having claimed the privilege against self-incrimination, testifies before any court, grand jury or the State Commission of Investigation after having been informed that his failure to appear and testify would subject him to removal from his office, position or employment, such testimony and the evidence derived therefrom shall not be used against such public employee in a subsequent criminal proceeding under the laws of this State; provided that no such public employee shall be exempt from prosecution or punishment for perjury or false swearing committed while so testifying.

Statement of the Case[2]

Respondent Joseph S. Portash was prosecuted for misconduct in office (contrary to N.J.S.A. 2A:85-1) and extortion by a public official (contrary to N.J.S.A. 2A:105-1).[3] During the period at issue Mr. Portash was a member of the Ocean County Board of Chosen Freeholders (the executive branch of county government), mayor of Manchester Township, Executive Director of the Pinelands Environmental Council (responsible for planning the development of thousands of acres of virgin land in southern New Jersey) and a self-appointed member of the Manchester Township Municipal Utilities Authority (responsible for utilities in the developing township area).

[2] This statement will focus upon those facts specifically relevant to the issues presented.

[3] The indictment is reproduced in the Appendix to Respondent's brief submitted to the Superior Court of New Jersey, Appellate Division.

In September or October of 1972 Constance Kulpinski, an assistant bookkeeper at the Madison Agency, a realty and insurance brokerage firm in Lakewood, New Jersey, discovered that Mr. Portash had accepted approximately $31,730, less taxes, from Donald Safran, part-owner of the agency, for a "no-show" job. Aware that Robert Schmertz, the president of Leisure Technology, a large developer in the county and Manchester Township, was also a principal in the agency, Ms. Kulpinski reported her discovery to the police. (See 2T33-11 to 25).[4] Mr. Portash's employment at the agency was merely a conduit for illegal payments by Leisure Technology Corporation for favorable treatment by Mr. Portash in his capacity as a public official.

State Police Detective Raymond Feldherr was assigned to the investigation of this case and he first interviewed Mr. Portash on March 15, 1973 (2T139-20 to 2T140-5). In response to questions by the detective, Mr. Portash stated that he was earning $9,500 annually as Director of the Board of Freeholders; $12,000 annually as Executive Director of the Pinelands Environmental Council; $6,200 annually as Director of the First State Bank; and $3,000 annually as a member of the Manchester Township Municipal Utilities Authority. Respondent claimed that he had no other sources of income (2T140-23 to 2T141-9). He produced a letter (S-11), dated June 30, 1971, which purported to set forth the specific terms of his former employment relationship with Madison Agency (2T140-1 to 18).

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[4] Transcript citations will be either to the portions of the record reproduced in the joint Appendix (designated "A" followed by page and line numbers) or to the volume of the transcript as previously designated in the state court briefs, see respondent's Appellate Division brief at pp. 2-3 and its New Jersey Supreme Court brief at p. 2.

Significantly, Mr. Portash had not produced this letter at an earlier interview on November 22, 1972 with State Police Officer Hallock, although he had the occasion and opportunity to have done so (10T148-4 to 20). It was apparently drafted after Officer Hallock had interviewed Mr. Portash. Detective Feldherr had conducted a similar interview of Donald Safran on the same date. It was also a coincidence that Mr. Portash told Detective Feldherr that he resigned from the agency on November 28, 1972, only six days after the two interviews (2T139-22 to 141-20).

Further investigation revealed that the letter was contrived to explain respondent's receipt of large sums from Madison Agency, as demonstrated by other testimony presented at trial. The initials of the typist on the letter were "vsf," but the only secretary at the agency with those initials, Virginia S. Frank, testified that she never typed this correspondence. She observed that the letter was "very sloppy," and she could not imagine Mr. Safran allowing a letter in such condition to leave the office (4T7-17 to 4T10-5). Detective Feldherr, an expert in document analysis, compared the letter with others from the agency and concluded that it had no similarity in paper stock, type print, letterhead and format (3T62-13 to 72-3). Another secretary at the agency, Anne Marie O'Brien, added that the ink color and format on the letter were different from that used in the office (3T150-10 to 153-7).

At the March 15, 1973 interview Detective Feldherr inquired of respondent as to his 1972 earnings from the agency. Mr. Portash, who claimed that he had earned about $14,000, admitted that after resigning he had not repaid the $10,000 advance from the agency. He asserted that the amount was not an advance payment, as expressed in the letter of June 30, 1971 (S-11), but rather was a

loan. The detective had previously obtained this check (S-5A) from the bank and he confronted Mr. Portash with the fact that Federal withholding taxes, F.I.C.A. deductions and unemployment insurance had been subtracted from the gross amount. Respondent was asked twice why such withholdings were made if the money were a loan. According to Detective Feldherr, Mr. Portash was visibly upset and declined to answer the inquiry (3T59-13 to 61-8).

Subsequently, it was represented to State law enforcement authorities that Mr. Portash was willing to discuss the matter and cooperate with them (A52-2 and 3; A93-21 to 23). Accordingly, on October 29, 1974 the State Grand Jury subpoenaed certain documents from Mr. Portash relating to his employment at Madison Agency, including site evaluations. Mr. Portash appeared with another attorney at an *in camera* hearing on November 6, 1974 and for the first time indicated a reluctance to testify (A93-17 to 20). He objected to the subpoena on the ground that production of the documents would infringe his right against self-incrimination. The court rejected this argument and ordered Mr. Portash to produce and identify these documents before the State Grand Jury. Fearful that his client might be exposing himself to charges such as obstruction of justice for producing fabricated documents, Mr. Portash's attorney stated that his client would not represent their authenticity or accuracy (A4-10 to 22-10). Mr. Portash produced the subpoenaed documents and identified them before the State Grand Jury on the afternoon of the same date, November 6, 1974 (A23-1 to 27-20).

Pursuant to another subpoena Mr. Portash appeared with his counsel in an anteroom outside of the presence of the State Grand Jury on November 14, 1974 (A29-1 to 30-5). Since the State considered respondent's testimony desirable for the prosecution of Robert Schmertz and Leisure Technology (A93-23 to 94-20), the prosecution stated for the record its agreement to grant statutory immunity from use of any adverse evidence derived from "the testimony that Mr. Portash is about to give before the Grand Jury" in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury. Respondent's counsel noted that since the immunity statute was self-executing, this informal method of granting immunity was satisfactory. The prosecution also made it clear to Mr. Portash, however, that evidence had been presented to a separate grand jury and no representation was made insofar as prosecution for offenses committed as shown by that evidence (A30-1 to 31-16). Respondent then testified before the State Grand Jury.

The substance of his immunized testimony was restricted to the documents he had submitted on November 6, 1974, which he admitted were fabricated in November, 1972 after the State Police began investigating him. According to Mr. Portash, he had prepared some of these documents together with Donald Safran to substantiate his employment. Subsequently, they had met together with Mr. Schmertz and two lawyers, and the general consensus at the meeting had been that there had to be more records to justify the compensation he had been given. Mr. Portash believed that the lawyers had suggested preparing the records irrespective of their authenticity (A34-1 to 39-25). Asked if Mr. Schmertz knew that he was employed by Donald Safran, Mr. Portash replied that he was acquainted with Mr. Schmertz because they both were members of the bank board, and Mr. Schmertz occassionally asked "What are you doing;" "How are you getting along;" "Are you working hard?" and general conversation along these lines with specific reference to respond-

ent's employment at the Madison Agency (A40-2 to 25). Respondent had first met Mr. Schmertz at County Planning Board meetings in the early 1960's and had been offered jobs in the area. Eventually, Mr. Schmertz had offered him the position on the bank board and arranged for him to acquire the necessary shares by borrowing the money at a legal rate. Schmertz had also arranged for respondent to be employed at the bank as Director of Real Estate, which involved appraisal work (A46-14 to 48-7).

Mr. Portash also admitted before the State Grand Jury that one of the letters relating to his employment at Madison Agency which he had shown to Detective Feldherr (Exhibit SGJ16) had been prepared after the State investigation commenced and not at the time indicated on the letter. Respondent claimed that he did not type the letter, it had been sent from Mr. Safran and he (Portash) was under the impression that Safran's wife may have typed it (A40-30 to 41-23). Mr. Portash testified that he resigned from Madison Agency on the advice of his attorney. The prime factor was the pending investigation (A41-24 to 43-1).

Approximately two weeks after Mr. Portash's grand jury testimony, "charge bargaining" discussions took place to aviod the necessity of his indictment (See A100-1 to 34). These discussions incorporated several prerequisite conditions upon which there had been general agreement: Portash was to resign from his position as mayor of Manchester prior to January 1, 1975; he was expected to cooperate in the case including the prosecution of Schmertz and Leisure Technology, and most importantly from the State's viewpoint, he was to cooperate in the investigation of a contract between the Pinelands Environmental Council and Meridian Engineering which was deemed more significant in its impact than the instant case (A94-20 to 95-7; A100-34 to 101-3). Very soon after these

initial "charge bargaining" discussions, the State made it known that it would also require restitution of the amounts which Mr. Portash received through Madison Agency (A95-7 to 15).

Mr. Portash failed to honor his commitment to resign as mayor by January 1, 1975 (A95-15 to 20). Subsequently, there was a request to extend the date to February 1, 1975, to which the State reluctantly agreed. Mr. Portash, however, again failed to comply with this prerequisite (A101-3 to 5).

In a telephone conversation with the investigating deputy attorney general on the evening of February 4, 1975, Mr. Portash's attorney vehemently opposed restitution of the full amount of the money his client had received after taxes, *i.e.* $24,322, arguing that the sum was just too high. This impasse was later discussed with the Director of the State Division of Criminal Justice, who conceded that the money differences could be resolved. It was decided that in the meantime the Portash prosecution would be deferred but they would proceed as scheduled to obtain the indictments against Schmertz and Leisure Technology (A95-20 to 96-3). As a condition of holding off on Mr. Portash's indictment, however, a statement was taken from him the next day, February 5, 1975, in anticipation of his cooperation in the Schmertz trial (A85-32 to 86-10; A90-5 to 26). Thus, the statement of February 5, 1975 was given as a part of the charge bargaining negotiations; there is no indication that it was given under an extended grant of statutory immunity.

This statement of February 5, 1975 generally concerned the circumstances of Portash's employment with the Madison Agency and favorable treatment accorded to Leisure Technology. It included a significant admission by Mr. Portash:

> Q. Did you know at that time when you originally accepted the offer that Mr. Schmertz had an interest in Madison Agency?
>
> A. No, not initially. I didn't know until about two weeks later (A59-27 to 30).[5]

He also admitted correlating in his own mind his employment at Madison Agency and Leisure Technology's application to the Utility Authority for a franchise, stating that it gave him an awkward feeling that he was being used. He felt "obligated to the corporation . . . [b]ecause of the employment at the Madison Agency." (A66-20 to 68-22). According to his statement, "it was a contributing factor to his decision on the franchise application (A68-23 to 27). Finally, he again acknowledged fabricating some of the site applications (A72-19) and the letter justifying his $15,000 annual salary at Madison Agency (A75-16 to 76-4).

Later in February 1975, Mr. Portash met twice with another deputy attorney general assigned to handle the Schmertz trial to review his anticipated testimony in that case (A99-25 to 33). Mr. Portash's attorney also met with the investigating deputy attorney general to discuss the question of restitution. At that time Mr. Portash's attorney indicated that the money question could be negotiated; he also discussed Mr. Portash's mental state as well as the terms of his resignation (A95-7 to 96-13). There followed some telephone conferences (A101-12), and during the next

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[5] In his Appellate Division brief respondent Portash represents that if he had testified at trial, "he would have indicated that he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of his employment and indeed never learned of the fact that Schmertz [*sic*—Safran] had an equal but silent partner during his employment." (Respondent's Appellate Division brief at p. IV). He makes the same representation in his Brief in Opposition to Petition for Certiorari at p. 6.

two or three weeks the State indicated that if it settled the restitution question for $15,000, as proposed by Mr. Portash's attorney, the State would require Mr. Portash to resign from his position as Executive Director of the Pinelands Environmental Council (A86-19 to 88-9; A90-31 to 91-25; A96-18 to 30; A103-14 to 27). Otherwise the State would stand by its original offer to accept $24,322, resignation from the township committee and position of mayor, and cooperation in the Schmertz and Pinelands Environmental Council cases. The State added the alternative proposal in light of information received during preliminary discussions with Mr. Portash which justified his resignation from the other position of public trust (A96-30 to 97-2).

On March 27, 1975 Mr. Portash's attorney met with the State's representatives to discuss the alternatives (A97-3 to 5; A101-14 to 17). A written document (S-1) incorporating the terms of the proposals was drawn up (A102-14 to 27). His attorney indicated that Mr. Portash was going away for a few days to think it over (A101-17 to 20). After Mr. Portash returned, his attorney contacted the State's representatives and asked them to talk directly with Mr. Portash. The investigating deputy reluctantly agreed to this extraordinary request and spoke with Mr. Portash on the telephone for over an hour. Mr. Portash indicated that he was troubled about making the right decision, asserting that he had done nothing wrong and that to return the money and resign would be too much for him to bear. Consequently, he rejected both alternatives and decided to defend against the charges (A97-7 to 98-11; A101-20 to 26).

The State, which had been led to believe by Mr. Portash's representations that he would cooperate and abide by the prerequisites throughout the course of the discussions, was left with no recourse but to present the case to the State Grand Jury. The indictment was returned on April 24, 1975 (A86-30 to 12; 98-11 to 99-15; A101-26 to 31).

Prior to trial on this indictment at a hearing on December 15, 1975, Mr. Portash's counsel moved for dismissal of the indictment or in the alternative for a ruling on the use of respondent's immunized testimony and subsequent statements. Defense counsel argued that the grant of immunity and charge bargaining negotiations constituted a form of contractual agreement which precluded the bringing of the indictment as long as his client cooperated with the State. Enforcement of the agreement would require exclusion of all evidence and the State would have no case. Pursuant to this agreement his client gave the statement on February 5, 1975 "to nail down his testimony, in anticipation that he was going to be a witness for the State in the matter of State versus the late Mr. Schmertz, Leisure Technology, and one Safran." (A84-1 to 89-6). In other words pursuant to this understanding his client gave this statement "for him to preserve the promise that he would not be indicted where he cooperated with the State." (A86-13 to 23). Counsel observed that his client was not indicted or named as a coconspirator at the time of the Schmertz indictment. The defense contended that the State did not act irrationally in this respect but in accordance with the negotiated agreement which had begun with the immunity grant and also included the statement of February 5. The defense asserted that the State, however, kept demanding more from Mr. Portash, and counsel questioned the Attorney General's authority to do this (A90-5 to 91-19).

The prosecution responded that Mr. Portash failed to comply with certain prerequisites of the negotiations, such as resigning as mayor by January 1, 1975. In essence the parties never came to a mutual agreement to avoid the indictment. Mr. Portash finally decided that he could not live with the prerequisite conditions and would rather contest the charges. Accordingly, the State felt compelled to proceed with the indictment (A93-12 to 102-13).

In rejecting the defense contention the court found that there was no promise or contract in the record precluding the indictment and in any event such a promise would not be enforceable (A106-6 to 109-34; A123-23 to 132-30). Counsel also argued that the indictment should be dismissed because his client was compelled to incriminate himself by complying with the State Grand Jury subpoena for certain employment records (A113-9 to 119-6). The State represented that except for records that were not privileged (*e.g.* corporate documents), were in the public domain (*e.g.*, opinion letters of the utilities authorities), or were in the possession of the State before Mr. Portash was subpoenaed, it had no intention of utilizing the materials obtained pursuant to the subpoenas (A119-24 to 121-5). The court accepted this representation and denied the defense dismissal motion (A121-17 to 31; A123-9 to 13).

Defense counsel then requested an anticipatory ruling on what evidence was excluded under the grant of immunity. He acknowledged that such evidence could be utilized to impeach respondent if he took the stand and perjured himself (A143-17 to 144-19). Counsel argued, however, that no testimony, documentation or any fruits of his client's appearance before the Grand Jury or his statement of February 5 could be used otherwise either on cross-examination or in rebuttal (A144-22 to 28). The prosecution replied that it would proceed on the assumption that every witness who takes an oath testifies truthfully, and the court was not capable of making an anticipatory ruling on what evidence could be used against respondent if he should choose to take the stand. Nevertheless, the State contended that if Mr. Portash takes the stand, he waives all immunity and the State can use any legitimate evidence to attempt to impeach his credibility. The State should be allowed to pursue in cross-examination any avenue that the defendant testifies to on his direct case. Otherwise, the court would be condoning perjury (A144-30 to 145-24).

The court noted the vagueness of the anticipatory ruling which defense counsel was requesting, and it observed that it was not permitted to make advance pretrial evidentiary rulings except for a motion to suppress under the Fourth Amendment. The only way it could feasibly make such a ruling would be to conduct a "dry run" of Mr. Portash's testimony out of the presence of the jury, which in essence would require counsel to try his case twice. Although defense counsel encouraged the court to conduct such a pretrial *voir dire*, it refused to grant such an unprecedented request in contravention of the normal evidentiary procedure (A145-25 to 148-19). After summarizing the rule in *Harris* v. *New York*, 401 U.S. 222 (1971), the court concluded:

> So this Court would hesitate to make a pronouncement first, as to what can be used and what can't be used. Secondly, this Court would hesitate to have a dry run of direct examination and cross examination, because then, depending upon the Court's ruling, the Court may have heard one version of what's taken place, and then after the Court has made its ruling, a Jury might hear another version of what has taken place; and if the fundamental aspect of a trial be a search for truth, that would be an aberration from the search for the truth. So the one thing the Court can say is, that it can make no evaluation, no anticipatory ruling, as to what may be admissible. I am inclined to think the rule, the Harris rule, is a proper one, utilized for the sole purpose of impeaching credibility and not as substantive evidence (A151-4 to 19).

The court made it clear that it would never permit the use of a collateral statement; under the rules of evidence the inconsistency must be material to the testimony (A152-6 to 153-6). Asked by defense counsel if the court was saying "we will face it when we get there?", the court replied "That's the only thing I can say." (A153-7 to 9). Following this hearing respondent obtained another attorney who was duly substituted as trial counsel.

The defense renewed its request for an anticipatory ruling on February 5, 1976, after completion of the State's case, arguing that truthful immunized testimony should be excluded from any use whatsoever and suggesting that the prosecution should be confined to questioning defendant on his limited direct testimony (A158-1 to 162-33). The prosecution noted that the court was faced with three possible situations: respondent might repudiate his prior testimony as untruthful in whole or part; he might testify in accordance with prior truthful statements, which created no problem; or he might state that the prior statements were truthful but would testify falsely at trial. Assuming that the court was faced with the last situation, then the State maintained he would be giving advance notice of the intent to perjure himself at trial, which would be a fraud perpetrated on the court in an attempt to secure a deliberately false judgment. The prosecution argued that this situation fell within the ambit of the *Harris* rationale and also noted that if defense counsel knowingly participated in such a fraud, he would be subjecting himself to disciplinary action (A164-20 to 165-16).

Defense counsel protested that his client would testify only to the truth, would not discuss his grand jury testimony in any way and that, in any event, the only remedy for false testimony would be a subsequent prosecution for perjury or false swearing, citing *United States* v. *Hockenberry*, 474 F.2d 247 (3 Cir. 1973) (A168-10 to 169-3; A171-15 to 28). The court reiterated that respondent would be protected against use of non-material cross-

examination (A172-12 to 14). The court questioned whether the scope of an *Evidence Rule* 8[6] evidentiary hearing could include counsel's contentions on the scope of cross-examination (A172-27 to 33).

The prosecution noted that if the defense representations were accurate that respondent would testify truthfully, the whole discussion was academic since the State would not attempt to cross-examine him with his prior statements (A197-28 to 198-3). The court stated that it would defer ruling and handle the matter on a question-by-question basis, requiring questions related to the grand jury testimony to be first posed at side bar for a specific ruling (A198). The prosecution explained that it was seeking permission to utilize material inconsistencies between respondent's sworn testimony before the grand jury and at trial under the rationale of *Harris* v. *New York*, 401 U.S. 222 (1971) and state cases which followed the *Harris* rule (A199). The court opined that it was a new area of law and the court was inclined to believe that if the Supreme Court were to decide the issue, it would say that the shield provided by the immunity statute cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances (A201).

Further argument was heard in chambers on February 9, 1976 regarding the scope of cross-examination if respondent testified on his own behalf. Defense counsel stated that he could not advise his client to take the stand because he (counsel) was confused and unclear about the prior ruling. Noting the extent of the grand jury testimony, the evidence derived from it and respondent's subsequent statements, counsel contended that it would be "nightmarish" for the court to determine consistency and

[6] See footnote 7, *infra* p. 22.

inconsistency unless the court first conducted a *voir dire* of respondent's testimony and made advance rulings on the prosecutor's questions. In the absence of such a hearing his client would be exercising his rights in a vacuum (A214-1 to 217-16). The prosecution objected to a "trial run" of respondent's testimony or to any attempt by respondent to curtail effective cross-examination based on the State's case-in-chief by limiting the scope of respondent's direct examination (A217-28 to 219-17). The court observed that respondent could be cross-examined about anything reasonably related to evidence in the case-in-chief separate and apart from the grand jury testimony, and that the court could not give an advance evidentiary ruling on every question posed (A224-10 to 225-32; A230-1 to 5).

Following a recess defense counsel announced that he could not advise his client to take the stand in light of the court's ruling (A236-9 to 25). Counsel renewed his request for a *voir dire* of defendant's testimony, and the court responded:

> What you're asking the Court for is plenary, evidentiary rulings in advance which the Court, even if it were inclined to do so, is not permitted. There is no such thing as a dry run in a criminal case (A242-1 to 10).

The colloquy ended with a representation by defense counsel that it was defendant's decision not to take the stand (A245-26). Respondent was subsequently found guilty by the jury of extortion and was given a suspended sentence.

On appeal the Superior Court of New Jersey, Appellate Division held that although the evidence supported the jury's verdict of respondent's guilt, the trial court's ruling which would have permitted the State to use respondent's

immunized grand jury testimony for impeachment purposes had impaired respondent's right to testify on his own behalf. The Appellate Division found that in reliance on the trial court ruling and fearful of the use to which the grand jury testimony would be put, respondent decided against testifying. It, therefore, reversed the conviction and remanded for new trial. On January 17, 1978, the Supreme Court of New Jersey dismissed the State's appeal as-of-right and denied the State's petition for certification.

Summary of Argument

I. The record demonstrates that respondent's motions for an anticipatory evidentiary ruling to limit the scope of cross-examination on his proposed trial testimony and preclude use of his preindictment statements given after the grant of statutory "use plus fruits" immunity were premature and not properly cognizable. The request was first made before trial and then later after the State's direct case. The trial court properly declined to make such an unauthorized, advance evidentiary ruling. Since respondent failed to assert his claim based on the United States Constitution at the proper time and never testified on his own behalf at trial, there was no cognizable impairment of his constitutional rights presenting a justiciable controversy. *Garner* v. *U.S.*, 424 U.S. 648 (1976); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *Communist Party of U.S.* v. *S.A.C.B.*, 367 U.S. 1 (1961). The state appeals court erred in anticipating a federal constitutional question in advance of any necessity compelling such a decision, and it formulated an abstract rule broader than required by the precise facts to which it applied. *Rescue Army* v. *Municipal Court*, 331 U.S. 549 (1946).

It is specious for respondent to claim that the trial court's ruling chilled his right to take the stand, since he had no right to commit perjury and the trial court's deferred ruling created no irreparable injury. See *U.S.* v. *Grayson*, —— U.S. ——, 98 S.Ct. 2610 (1978); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965).

II. While not admissible to prove the accused's guilt, testimony given pursuant to a statutory grant of immunity or as the result of charge bargaining negotiations may be utilized to impeach credibility under the rationale of *Oregon* v. *Hass*, 420 U.S. 714 (1975) and *Harris* v. *New York*, 401 U.S. 222 (1971). The Appellate Division's expansive interpretation of the privilege against self-incrimination barring the State from utilizing prior inconsistent immunized testimony either for impeachment purposes at trial or for a potential prosecution of perjury committed by respondent at trial was a misapplication of the principles enunciated in *Kastigar* v. *United States*, 406 U.S. 441 (1972). It erroneously insulated respondent from any effective sanction against such potential perjury. Since perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings, effective restraints against this type of offense are imperative. *U.S.* v. *Mandujano*, 425 U.S. 564 (1976).

If the defendant voluntarily takes the witness stand, he waives his privilege against self-incrimination, he is under an obligation to speak truthfully and accurately, and he has no protected right to commit perjury. *Brown* v. *U.S.*, 356 U.S. 148 (1958); see also *U.S.* v. *Grayson*, —— U.S. ——, 98 S.Ct. 2610 (1978). It does no violence to the privilege that a person's choice to testify opens the door for impeachment with such otherwise inadmissible evidence. See *McGautha* v. *California*, 402 U.S. 183 (1971). The shield of immunity should not be perverted into a license to commit perjury before a grand jury or trial

court free from the risk of confrontation with the prior inconsistent utterance. See *Oregon* v. *Hass, supra; Harris* v. *New York, supra.* The security of the community, regard for the integrity of the judicial process and the ultimate purpose of the trial to ascertain truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. *Brown* v. *U.S., supra.*

The intent of the privilege is to preclude use of involuntary confessions because of probable unreliability, the insistence on requiring the government to prove guilt without invasion of privacy, and abhorrence of official illegality. *Blackburn* v. *Alabama,* 361 U.S. 199 (1960). Unlike a coerced confession, however, an immunized statement is expected to be truthful, for the reasons to falsify are removed. It is conceded that the government cannot use an immunized statement to prove its case. However, the statement, obtained through time honored, legal means, is usually reliable and should be admissible to impeach credibility. In any event, if it is unreliable it certainly is not entitled to protection. *Glickstein* v. *U.S.,* 222 U.S. 139 (1911).

The most damaging statement at issue in this case was not given under statutory use immunity but pursuant to "charge bargaining" negotiations several months after the grand jury inquiry. This statement of February 5, 1975 was the voluntary product of counselled respondent's free will and rational intellect, since he entered into the negotiations as the intelligent choice between available alternatives. It was not coerced with the threat of a contempt prosecution, its trustworthiness satisfied legal standards, and it was obtained in a legal manner. While the State properly made no use of the charge bargaining statement to prove respondent's guilt, the prosecution should be permitted to use it solely to impeach respondent even if the grand jury immunized statement is inadmissible.

LEGAL ARGUMENT

POINT I

Since respondent's motions for exclusion of the immunized testimony were premature and the State never utilized it against him at trial, the intermediate State Appeals Court erred in reversing the conviction on federal constitutional grounds.

The record demonstrates that respondent's motions for exclusion of his statements following the grant of immunity were premature and not properly cognizable. Respondent first requested an anticipatory evidentiary ruling on December 15, 1975 concerning the use by the State of his immunized testimony on cross-examination in the event he testified. While acknowledging that it could be used to impeach him if he perjured himself, he contended that it could not be utilized otherwise either on cross-examination or in rebuttal (A143-17 to 144-28). The prosecution replied, *inter alia,* that it would proceed on the assumption that a witness under oath testifies truthfully and it expressly objected to an advance ruling on what evidence was admissible against respondent if he chose to take the stand (A144-30 to 145-7). The court agreed with the prosecution, noting the vagueness of the defense request and observing that it did not have the authority to make pretrial evidentiary rulings except in the limited area of suppression under the Fourth Amendment. The court theorized that the only feasible way to make such a ruling would be to conduct a "dry run" of Mr. Portash's testimony which would contravene established practice (A145-25 to 148-19). In refusing to conduct such a *voir dire* the court noted that respondent might give different versions at an evidentiary hearing and later before a jury (A151-4 to 16).

When respondent's substituted trial counsel renewed the request on February 5, 1976 after the completion of the State's case, the trial court ruled that it would not permit the State to impeach respondent with inconsistent prior statements which were not material. Counsel then sought a ruling against enlargement of his client's testimony on cross-examination, but the court questioned whether counsel's request was beyond the scope of a *Rule* 8 evidentiary hearing[7] (T162-15 to 172-33). The trial court concluded that it would defer ruling and handle the matter on a question-by-question basis, requiring questions relating to respondent's immunized testimony to be first posed at side bar for his protection (A198-8 to 201-14). Of course respondent subsequently decided not to testify.

Thus, respondent was not being accurate when he contended before the Appellate Division that the trial court permitted the State to cross-examine respondent with his immunized grand jury testimony. In support of his claim that the ruling infringed his privilege against self-incrimination, respondent relied primarily upon such cases as *Kastigar* v. *United States*, 406 U.S. 441 (1972), and *United States* v. *Hockenberry*, 474 F.2d 247 (3 Cir. 1973), indicative that his claim was based on a mechanistic assertion of the Fifth Amendment of the United States Constitution. The State in its brief responded that since respondent's grand jury testimony was never utilized, his contention was "entirely academic and without foundation." The State further characterized the issue as "abstract, academic, hypothetical or speculative" and argued that to constitute a constitutional infringement, the claim "should be something more than mere form and assertion, without foundation (Petitioner's Appellate Division brief at pp. 15-17). The same contention was asserted before the State Supreme Court (Petitioner's State Supreme Court brief at pp. 11-14). Thus, respondent is incorrect when he asserts in his Brief in Opposition to Petition for Writ of Certiorari at p. 16 that "the State properly failed [sic] to object to the procedure at trial and further failed to directly raise the issue at a subsequent appeal."

[7] Respondent's reliance on *N.J. Evidence Rule* 8 in his Brief in Opposition to Petition for Certiorari at p. 15 is misplaced. This rule authorizes a preliminary inquiry by the judge "[w]hen the qualification of a person to be a witness, or the admissibility of evidence, or the existence of the privilege is stated in these rules to be subject to a condition. . . ." While such a hearing is to be held outside the presence of the jury before the privilege may be utilized, the rule does not contemplate an advisory ruling on abstract or hypothetical issues.

In reversing respondent's conviction the Appellate Division held that the immunity device:

> . . . will only be deemed a sufficient answer to a claim of privilege if the scope of immunity afforded is commensurate in all respects with the privilege against self-incrimination which it replaces. *United States* v. *Calandra*, 414 U.S. 338, 346, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *Kastigar* v. *United States*, 406 U.S. 441, 459, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). In order for a grant of immunity to pass constitutional muster as an adequate substitute for the self-incrimination privilege, it must leave the witness whose testimony has been compelled and prosecutorial authorities 'in substantially the same position as if the witness had claimed the Fifth Amendment privilege.' *Kastigar* v. *United States*, *supra* at 462, 92 S.Ct. at 1666. (151 N.J. Super. at 205, 376 A.2d at 953).

The Appellate Division opined that the proposed use of the immunized grand jury testimony to impeach respondent's trial testimony would not leave the parties in the position each would have occupied had respondent's claim of privi-

lege been honored. (*Id.*) In addition to this inaccurate conclusion the Appellate Division accepted respondent's assertion that he had "sought the trial court ruling under consideration as a basis upon which to decide whether to testify in his own behalf" and "[i]n reliance thereon, and fearful of the use to which the grand jury testimony would be put, he decided against testifying." Consequently, the Appellate Division held that the verdict was, therefore, based on partial evidence and reversal of the conviction was required. (151 N.J. Super. at 209, 376 A.2d at 955).

At the outset, it is apparent that respondent's contention [in his Brief in Opposition to Petition for Certification at pp. 18-20] that the Appellate Division decision was based upon its interpretation of the state constitution and statutes is not supported by that court's opinion. On the contrary, the court proceeded to consider the issue of the admissibility of the immunized testimony by construing federal constitutional requirements in light of *Kastigar* and *Hockenberry*. Indeed, the New Jersey Constitution contains no expressly comparable guarantee and there is no existent common law doctrine in New Jersey directly on the issue. It is therefore submitted that respondent's claim arises solely under the Fifth Amendment of the United States Constitution, and federal standards and procedural rules must govern in determining the sufficiency and temporal propriety of that claim. Under the facts set forth, petitioner submits that respondent has not satisfied the standards established by this Court for a valid assertion of the privilege against self-incrimination. As will be demonstrated, the proceeding involved no unfairness, and due process and Sixth Amendment rights were not implicated.

The Fifth Amendment addresses the compulsion of testimony from a witness. "It does not preclude a witness

from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *Garner* v. *United States*, 424 U.S. 648, 654-655 (1976); *United States* v. *Monia*, 317 U.S. 424, 427 (1943). The privilege against self-incrimination is one which normally must be claimed by the individual who seeks to avail himself of its protection. *Communist Party of United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 107 (1961). There, this Court recognized that "[m]erely potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated." *Id.* at 71.

This Court has always advocated a policy of strict necessity in disposing of constitutional issues. See, *e.g.*, *Bowen* v. *United States*, 422 U.S. 916, 921 (1975). One factor in determining justiciability is the timeliness in raising and presenting constitutional issues. The Court has developed, for its own governance in the cases within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all of the constitutional questions pressed upon it for decision. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-569 (1946); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (Brandeis, J. concurring at 346). Constitutional rules affecting legislation will not be determined ". . . in advance of the necessity for deciding them, in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which

the question may be avoided." *Rescue Army* v. *Municipal Court, supra* at 331 U.S. 569; *Ashwander* v. *Tennessee Valley Authority, supra* at 297 U.S. 346-348, and authorities cited.

In this case, however, the Appellate Division in construing N.J.S.A. 2A:81-17.2a2 in relation to federal constitutional principles erred in anticipating a federal constitutional question in advance of any necessity compelling such a decision, and improperly formulated a federal constitutional remedy not required by the facts in this case.

It must be emphasized that at no time did Mr. Portash take the stand on his own behalf. The trial court properly ruled that respondent had no right to an advance evidentiary ruling on the general scope of cross-examination prior to his testimony and he could not limit the inquiry on any matter in evidence. See generally, *McGautha* v. *California*, 402 U.S. 183, 214-216 (1971). It also properly refused respondent's unusual request for a *voir dire* hearing to preview his testimony. Petitioner submits that the trial court adopted the best course of action under the circumstances, deferring its ruling while the issue was abstract and hypothetical and requiring the prosecution to pose any question implicating immunized testimony at side bar out of the hearing of the jury for a ruling on admissibility. Respondent was protected by this procedure and it would have been appropriate for him to press his specific objections at the time when the judge could best and most expeditiously evaluate the issues in the full light of the evidence presented.

It was specious for respondent to argue that the trial court's "ruling prevented him from taking the stand," citing *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965). (Respondent's Appellate Division reply brief at p. 4). In

Dombrowski the constitutional issues were presented in a distinguishable factual context. In the present case there was no bad faith harassment of respondent irreparably injuring his expression of constitutional rights.

Respondent voluntarily chose to adopt a strategy, sanctioned by the Appellate Division, which foreclosed proper consideration of the issue at trial. He represented that he had decided not to testify based upon the trial court's ruling. Since the trial court had deferred its ruling, however, it correctly pointed out that nothing could be further from the truth (A241-23 to 33). Even if the trial court subsequently had rendered a ruling which respondent deemed erroneous, his remedy was to testify truthfully and challenge the ruling on appeal. He had no constitutional right to take the witness stand and commit perjury while under oath. As this Court recently said in *United States* v. *Grayson*, —— US. ——, 98 S.Ct. 2610, 2618 (1978):

> The right guaranteed by law to a defendant is narrowly the right to testify truthfully in accordance with the oath—unless we are to say that the oath is mere ritual without meaning. This view of the right involved is confirmed by the unquestioned constitutionality of perjury statutes, which punish those who willfully give false testimony. See *e.g.*, 18 U.S.C. §1621; *cf. United States* v. *Wong*, 431 U.S. 174, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977). Further support for this is found in an important limitation on a defendant's right to the assistance of counsel: counsel ethically cannot assist his client in presenting what the attorney has reason to believe is false testimony. See *Holloway* v. *Arkansas*, —— U.S. ——, —— n.4, 98 S.Ct. 1173, 1176 n.4, 55 L.Ed.2d 426 (1978); ABA Standards Relating to the Administration of Crim-

> inal Justice—The Defense Function §7.7(c), at 133 (1974). Assuming, *arguendo*, that the sentencing judge's consideration of defendants' untruthfulness in testifying has any chilling effect on a defendant's decision to testify falsely, that effect is entirely permissible. There is no protected right to commit perjury.

Furthermore, since respondent contended before the trial court that the proper remedy for his false trial testimony would be a prosecution for perjury rather than impeachment (*e.g.* A175-20), his assertion that the trial court's ruling had a "chilling effect" is certainly a *non sequitur*. A perjury prosecution is a high misdeamnor (felony) whereas the charges in this case carried a lesser penalty.

Under these circumstances it is submitted that respondent's decision not to testify was a pretext to avoid the prosecutor's cross-examination and manufacture a colorable issue in the event of his conviction. Such a strategic choice was not compelled by the situation. No potential infringement of the privilege could occur until the prosecutor propounded a question involving respondent's immunized testimony. Until then respondent's claim was of "a hypothetical or abstract character." See *Flast* v. *Cohen*, 392 U.S. 83, 100 (1968); *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). It is submitted that the Appellate Division erred in accepting respondent's alleged rationale for invoking his right not to testify at trial. Respondent had the opportunity to testify if he so desired.

Since respondent did not actually testify, it can only be speculated whether he genuinely intended to take the stand or even whether he might not have undergone a last-second change of heart if the court had ruled in his favor, particularly after it was made clear to him that by limiting

his testimony to certain matters he could not restrict the State's cross-examination with all the evidence in its case-in-chief. Until respondent took the stand and testified, it was impossible to anticipate the exact content of his testimony or delimit the scope of possible cross-examination based on such direct examination testimony. Thus, it would have been ineffective to conduct any sort of *voir dire* or trial run of respondent's intended testimony, as his counsel requested. It would have been impractical to determine whether respondent's prior statements would be inconsistent with this testimony, and premature to determine whether the immunized grand jury statement was true or false. See *United States* v. *Moss*, 562 F.2d 155 (2 Cir. 1977), *cert.* den. —— U.S. ——, 46 U.S.L.W. 3555 (No. 77-661, 1978) (discussed *infra*).

In conclusion, the claim raised by respondent arises solely under the Fifth Amendment of the United States Constitution, federal standards apply in adjudicating that claim, and no state procedural rule is pertinent. Under the facts set forth petitioner submits that respondent has not satisfied the standards established by this Court for a valid assertion of the privilege against self-incrimination.

POINT II

The State should be permitted to impeach a defendant's trial testimony with materially inconsistent statements given after the grant of immunity to preserve the integrity of the judicial system.

The novel issue presented by this case is whether the Fifth Amendment privilege against self-incrimination as it applies to the states under the Fourteenth Amendment shields a defendant's trial testimony from impeachment with materially inconsistent statements given after the grant of "use plus fruits" immunity. While not admissible to prove the accused's guilt, petitioner submits that prior immunized testimony should be admissible to impeach the accused's materially inconsistent trial testimony.

The trial court deferred its ruling on the admissibility of the statements given after the grant of statutory immunity. The court, however, took note of this Court's decisions in *Oregon* v. *Hass*, 420 U.S. 714 (1975) and *Harris* v. *New York*, 401 U.S. 222 (1971) and decisions of the New Jersey Supreme Court in *State* v. *Davis*, 67 N.J. 222, 337 A.2d 33 (1975) and *State* v. *Miller*, 67 N.J. 229, 337 A.2d 36 (1975). The trial court opined that it was inclined to believe that if the Supreme Court were to decide the issue presented, it would hold that the shield provided by the immunity statute cannot be perverted into a license to use perjury as a defense, free from the risk of confrontation with prior inconsistent utterances (A201). On appeal the Appellate Division held that the proposed use of the immunized grand jury testimony to impeach defendant's trial testimony would have violated the principles set forth by this Court in *Kastigar* v. *United States*, 406 U.S. 441 (1972). (151 N.J. Super. at 205, 376 A.2d at 953). The Appellate Division further held that it would not have

permitted the State to utilize the immunized testimony to charge respondent with perjury if he lied on the stand at trial. (151 N.J. Super. at 208, 376 A.2d at 954). Petitioner believes that the Appellate Division erroneously extended the holding in *Kastigar* and failed to take proper cognizance of the exception to the exclusionary rule enunciated by this Court in the *Hass-Harris-Walder* line of cases. The decision below insulates respondent from every effective sanction against potential perjury.

In *Kastigar* this Court reviewed the history of testimonial compulsion which is firmly established in Anglo-American jurisprudence. The duty to testify has long been recognized as a basic obligation that every citizen owes to his Government. The general common law principle that "the public has a right to every man's evidence" is particularly applicable to grand jury proceedings. *Id.* at 444; *United States* v. *Calandra*, 414 U.S. 338, 346 (1974). This power is necessary to assure the effective functioning of government since such testimony constitutes one of the Government's primary sources of information. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 93-94 (1964). More specifically, the grand jury occupies a special role in insuring fair and effective law enforcement; it does not adjudicate but investigates to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person. The grand jury's investigatory power must be broad if its public responsibility is adequately to be discharged. *United States* v. *Calandra*, *supra* at 344-345; *Branzburg* v. *Hayes*, 408 U.S. 665, 700 (1972). The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered, even information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination. *United States* v. *Calandra*,

supra at 345-346; *Lawn* v. *United States,* 355 U.S. 339 (1958).

Of course, the grand jury's power is not unlimited. As explained in *Calandra,* the grand jury may consider incompetent evidence but it may not itself violate a valid privilege, constitutional or otherwise, such as forcing a witness to answer questions in violation of his Fifth Amendment privilege against self-incrimination. Rather, the grand jury may override a valid Fifth Amendment claim only if the witness is granted immunity co-extensive with the privilege against self-incrimination. 414 U.S. at 347; see *Kastigar* v. *United States, supra,* 406 U.S. at 450; *Murphy* v. *Waterfront Comm'n, supra,* 378 U.S. at 54; *Counselman* v. *Hitchcock,* 142 U.S. 547, 585 (1892). Immunity statutes seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. Their existence reflects the importance of testimony, and the fact that many offenses [such as bribery and extortion] are of such a character that the only persons capable of giving useful testimony are those implicated in the crime. See *Lefkowitz* v. *Turley,* 414 U.S. 70, 82 (1973); *Kastigar* v. *United States, supra* at 446-447. Thus the intent is not to give a benefit to the recipient of immunity but to make available to the prosecution for public policy reasons evidence that could not otherwise be obtained.

The Court in *Kastigar* rejected the contentions that no immunity statute could afford a lawful basis for compelling incriminatory testimony or that to be co-extensive with the scope of the privilege the statutes must provide transactional immunity. 406 U.S. at 449-454. The Court emphasized that "[w]hile a grant of immunity must afford protection commensurate with that afforded by the privilege it need not be broader." 406 U.S. at 454. This Court

held that a statute providing use and derivative use immunity is consonant with Fifth Amendment standards. According to the Court, "[i]t prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.* It is unclear whether this prohibition on use of immunized testimony "in any respect" was intended merely to preclude use by the prosecution to prove guilt or whether it was intended to anticipate the issue in this case.

This Court has stated that the privilege against self-incrimination "does not condone perjury." *United States* v. *Wong,* 431 U.S. 174 (1977); See *United States* v. *Grayson, supra,* —— U.S. ——, 98 S.Ct. 2610, 2618 (1978). It grants a privilege to remain silent without risking contempt, but it "does not endow the person who testifies with a license to commit perjury." *United States* v. *Wong, supra; Glickstein* v. *United States,* 222 U.S. 139 (1911). As this Court held in *United States* v. *Mandujano,* 425 U.S. 564, 576-577 (1976), immunity supplants the privilege against self-incrimination and:

> [i]n this constitutional process of securing a witness' testimony, perjury has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are, therefore, imperative. * * * [O]ur cases have consistently—indeed without exception—allowed sanctions for false statements or perjury . . . Even where a statutory scheme granted blanket immunity from further use of the testimony, the

> Court has found perjured statements to fall outside the grant.

In *United States* v. *Freed*, 401 U.S. 601 (1971), the defendants had claimed that they were privileged to withhold certain evidence, despite the fact that it could not presently incriminate them, because it could conceivably be used against them if they committed an offense in the future. Rejecting the contention, Mr. Justice Douglas, writing for the Court, observed:

> Appellees' argument assumes the existence of a periphery of the Self-Incrimination Clause which protects a person against incrimination not only against past or present transgression but which supplies insulation for a career of crime about to be launched. We cannot give the Self-Incrimination Clause such an expansive interpretation. (*Id.* at 606-607).

Likewise, the respondent in this case is not entitled to an expansive interpretation of the privilege to protect him against his speculative claim of possible infringement.

Several federal court decisions are also instructive. In *United States* v. *Tramunti*, 500 F.2d 1334 (2 Cir. 1974), *cert.* den. 419 U.S. 1079 (1974), the defendant was prosecuted for perjury committed when he testified as a witness on his own behalf at a previous trial for conspiracy, mail and stock fraud. On cross-examination the Government sought to impeach Tramunti's testimony with a transcript of his testimony before a grand jury. It was discovered after trial that this testimony had been given under grant of use immunity. On appeal the Circuit Court explained that the theory of immunity statutes is that in return for the surrender of the Fifth Amendment right,

the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange. The bargain struck is conditional, however, upon the witness who is under oath telling the truth. According to the court,

> If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the Constitution was intended to protect. Thus, the agreement is breeched and the testimony falls outside the constitutional privilege. Moreover, by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions. (*Id.* at 1342).

The court concluded that immunity does not extend *in futuro* to another crime not existing when the immunity was offered. It also rejected Tramunti's contention that the immunity statute should not be interpreted to permit the use of the testimony in other criminal trials not based on the original perjurious statements. Noting that there was authority that the listing of exceptions in the immunity statutes for subsequent criminal prosecutions is not intended to be an exclusive enumeration, the court held that "[t]he failure to include in the exceptions to the statute the use of false testimony to attack credibility or demonstrate the commission of prior similar acts does not prevent such use." (500 F.2d at 1345).

In accord with *Tramunti* is *United States* v. *Moss*, 562 F.2d 155 (2 Cir. 1977), *cert.* den. —— U.S. ——, 46 U.S.L.W. 3555 (No. 77-661, 1978). At issue in *Moss* was whether testimony given under the "use plus fruits" immunity provision of the Bankruptcy Act may be used for

impeachment purposes at a subsequent trial for the substantive offense of bankruptcy fraud if the defendant takes the stand and no objection to such use was raised. Relying on *Harris* v. *New York, supra* and *Walder* v. *United States, supra,* the prosecution contended that the immunized testimony could be used for impeachment on cross-examination even though it could not have been used as direct evidence. The court observed that the immunity grant does not protect perjury committed before trial under immunity any more than exclusionary rules protect perjury committed at trial. Since the appellant conceded that significant parts of this immunized testimony were perjured, the court held that the use immunity had been dissipated so far as the testimony was willfully false, and the acknowledgment by the defendant that it was perjurious rendered it usable at the trial on both the substantive offense and for perjury. In *dicta,* however, the court indicated its agreement with *United States* v. *Hockenberry, supra.*

Significantly, the prosecution in *Moss* was not for perjury, in which the jury determines whether the immunized testimony was perjurious directly by its verdict. On the substantive offense the perjury was collateral and not directly decided by the jury. The *Moss* court opined that to find in such a prosecution that particular immunized testimony was perjurious requires some preliminary finding of fact, or clear documentary evidence as in *United States* v. *Kahan, supra,* 415 U.S. 239, or as in both *Moss* and *Tramunti,* later objective proof. It left unresolved whether in the normal case a trial judge can resolve in advance, without conducting a mini-trial, that the immunized testimony was willfully false. (562 F.2d at 165). See also *United States* v. *Housand,* 550 F.2d 818, 822-823 n.8 (2 Cir. 1977), *cert.* den. 431 U.S. 970 (1977).

Both respondent and the Appellate Division relied on *United States* v. *Hockenberry, supra,* 474 F.2d 247, as authority precluding the use of immunized testimony for impeachment purposes. In *Hockenberry* the defendant, a former county detective, was charged with falsely testifying before the grand jury after receiving immunity. *Hockenberry* took the stand in his own defense and denied knowledge of or connection with bribes or payoffs to county detectives by persons engaged in unlawful gambling and prostitution. On cross-examination the Government impeached him with other truthful immunized grand jury admissions that he had falsely asserted personal knowledge of facts in search warrant applications. The issue was whether the trial court erred in permitting use for impeachment purposes of such truthful immunized testimony which was not material to the crime at issue. The court held that "the immunity statute properly permits prosecution for perjury committed in an otherwise immunized statement and also the introduction in evidence of so much of the statement as is essential to establish the *corpus delecti.*" (*Id.* at 249). It rejected, however, the Government's contention that it could use any truthful admission of wrongdoing made in an immunized statement to discredit the witness, since such an interpretation of the immunity statute would "jeopardize its adequacy as a constitutional means of requiring self-incrimination." (*Id.* at 250). Accord, *United States* v. *Frumento,* 552 F.2d 534 (3 Cir. 1977); *United States* v. *Housand, supra,* 550 F.2d 818; see also *United States* v. *Patrick,* 542 F.2d 381 (7 Cir. 1976), *cert.* den. 430 U.S. 931 (1977).

Petitioner submits that *Hockenberry* is factually distinguishable since it was primarily concerned with the use of non-material immunized testimony containing a truth-

ful admission of wrongdoing.[8] See Comment, "The Fifth Amendment And Compelled Testimony: Practical Problems In the Wake of *Kastigar*," 19 Villanova L.R. 470, 484-485 (1974).

Furthermore, it is contended that the restriction on the prosecution to the use of false immunized testimony in *Hockenberry* is not well founded. The State argued before the trial court that if respondent were representing that his immunized testimony was truthful but he intended to commit perjury at trial, this situation plainly fell within the ambit of *Oregon* v. *Hass* and *Harris* v. *New York*. According to the prosecution, the situation was even more blatant than in the *Hass-Harris-Walder* cases because the court was given advance notice that respondent intended to per-

[8] Respondent incorrectly alleges in his Brief in Opposition to Petition for Certiorari at pp. 22 and 28-29 that the State conceded that his immunized testimony was truthful and that the State requested and obtained a ruling from the trial court which prevented him from taking the stand at trial. Examining the record, it is apparent that it was the defense that requested an anticipatory ruling, at first conceding on the record that if Mr. Portash took the stand and committed perjury, he could be impeached with his prior inconsistent statements given after the grant of immunity (A144). When the substituted trial counsel renewed the defense motion on February 5, 1975, the State responded that the court was faced with three possible situations: respondent might repudiate his prior testimony as trutnful in whole or part; he might testify in accordance with prior truthful statements, which created no problems; or he might admit that the prior statements were truthful but he would testify falsely at trial. The deputy attorney general stated, "perhaps [defense counsel] could explain them to me or explain which one we have here because I don't know." (A164 to 165). It was consistently the State's position that in a perjury prosecution it did not have to prove which of two statements given under oath was false, and this position was expressly acknowledged by the trial court (*E.g.*, 171-2 to 13; A175-6; A178-2 to 5; A179-1 to 14).

petrate a fraud on the court in an attempt to obtain a deliberately false verdict. It was noted that for a defense counsel to abet such a fraud would constitute an ethical violation (A165). See *United States* v. *Grayson, supra*, 98 S.Ct. at 2618. It was also stressed that the ultimate purpose of a trial is the ascertainment of the truth and that an accused does not have the right to commit perjury on the stand. *Id.* The deputy attorney general concluded that the truth should prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination (A179). It is submitted that this contention was a correct extension of the Court's holding in *Hass*, *Harris* and *Walder*. See Comment, "The Fifth Amendment and Compelled Testimony: Practical Problems in the Wake of *Kastigar*," 19 Villanova Law Review 470, 481-485 (1974); Comment, "Impeachment, Use Immunity and the Perjurious Defendant, 77 Dickinson L.R. 23 (1972).

A defendant who takes the stand on his own behalf at trial waives his privilege against self-incrimination guaranteed by the Fifth Amendment. *E.g.*, *Doyle* v. *Ohio*, 426 U.S. 610 (1976) (Stevens, J., dissenting at 633); *McGautha* v. *United States*, 402 U.S. 183, 216 (1971); *Harrison* v. *United States*, 392 U.S. 219 (1968); *Brown* v. *United States*, 356 U.S. 148, 155-156 (1958); *Raffel* v. *United States*, 271 U.S. 494 (1926). This waiver is total (*Raffel, supra*) since any voluntary disclosure by the accused is likely to distort the probative picture. The defendant "has the choice, after weighing the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute." *Brown* v. *United States*, *supra* at 155-156. The Court in *Brown* concluded,

> It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. '[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.' *Walder* v. *United States*, 347 U.S. 62, 65, 74 S.Ct. 354, 356, 98 L.Ed. 503. The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. (*Id.* at 156).

Petitioner submits that the only effective sanction for a defendant's perjury under these circumstances is confrontation with his prior inconsistent statements. As noted in *Brown*:

> Striking the witness' testimony, or relying on the trier of fact to take into account the obvious unfairness of allowing the witness to escape cross-examination, must often in practice be poor substitutes for a positive showing under searching cross-examination that the testimony is in fact false. (*Id.* at 156 n.5)

Often a perjury prosecution by itself will not be an effective sanction; the prosecuting attorney should be permitted to conduct a probing, prying and pressing form of inquiry to expose falsehood and evasion to the jury and "to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." *Bronston* v. *United States*, 409 U.S. 352, 359-360 (1973).

The State believes that apposite analogy may be made to *Oregon* v. *Hass*, 402 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971) and *Walder* v. *United States*, 347 U.S. 62 (1954). In *Harris* the defendant had been interrogated by the police who had failed to advise her of the right to appointed counsel in accordance with *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The prosecution made no effort in its case-in-chief to use the statement, but after defendant testified in her own behalf, used it to impeach her. The Court held that evidence inadmissible against an accused in the prosecution's case-in-chief is not barred for all purposes, provided that it is trustworthy. It reasoned,

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. (citations omitted). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devises of the adversary process. • • •
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. (401 U.S. at 226-227).

It does no violence to the privilege that a person's choice to testify in his own behalf may open the door to otherwise inadmissible evidence which is damaging to his case. *McGautha* v. *California*, *supra*, 402 U.S. at 214. The immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury. *Glickstein* v.

United States, 222 U.S. 139, 142 (1911); see also *United States* v. *Bryan,* 339 U.S. 323, 340-341 (1950). Similarly, a grant of immunity does not protect a witness from personal disgrace or opprobrium resulting from his compelled testimony exposing his criminal behavior. *Brown* v. *Walker,* 161 U.S. 591 (1896). The purpose of the constitutional privilege against self-incrimination is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. *Id.;* see *Ullmann* v. *United States,* 350 U.S. 422 (1956); *Reina* v. *United States,* 364 U.S. 507 (1960); *Smith* v. *United States,* 337 U.S. 137 (1949); *Interstate Commerce Com.* v. *Baird,* 194 U.S. 25 (1904). It is submitted that the State should be permitted to utilize statements given after the grant of immunity, not for the purpose of proving the accused's guilt, but solely for impeachment purposes at the trial of the substantive crime.

In a comparable situation the defendant in *People* v. *Coleman,* 13 Cal.3d 867, 120 Cal.Rptr. 384, 533 P.2d 1024 (Sup. Ct. 1975) appealed from an order revoking probation, contending that the revocation of his probation in advance of trial on independent criminal charges denied him procedural due process because he was forced to forego his opportunity to testify in his own behalf at his revocation hearing in order to avoid incriminating himself at his pending trial. Recognizing possible tensions between constitutional rights, the California court invoked its supervisory power. It ruled that "upon timely objection the testimony of a probationer at a probation revocation hearing held prior to the disposition of criminal charges arising out of the alleged violation of the conditions of his probation, and any evidence derived from such testimony, is inadmissible against the probationer during subsequent proceedings on the related criminal charges.

However, permitted use of such immunized testimony for purposes of impeachment or rebuttal where the probationer's revocation hearing testimony or evidence derived therefrom and his testimony on direct examination are so clearly inconsistent as to warrant the trial court's admission of the revocation hearing testimony or its fruits in order to reveal to the trier of fact the probability that the probationer has committed perjury at either the trial or the revocation hearing." (120 Cal.Rptr. at 402). The California court explained that no purpose would be served by precluding use of that testimony or its fruits to impeach or rebut clearly inconsistent testimony which the probationer volunteers at his trial:

> The intent of our exclusionary rule regarding probation revocation hearing testimony is to encourage the fullest possible truthful disclosure of relevant facts and circumstances at the revocation hearing by allowing a probationer who does testify at his revocation hearing nonetheless to enjoy unimpaired the full protection of the privilege against self-incrimination at his subsequent trial. This privilege requires the prosecution to prove a defendant's guilt through evidence accumulated through its investigative efforts and not extorted from the defendant himself. While the privilege against self-incrimination does assure an accused of the right to remain silent at his trial, it does not—at least under modern principals of Anglo-Saxon jurisprudence (*cf. United States* v. *Grunewald* (2d Cir. 1956) 233 F.2d 556, 587-592 (appendix to dissenting opinion of Frank, J.), revd. (1957) 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed. 2d 931)—encompass a right of an accused to lie in his own behalf at trial. (See *People* v. *Barnes,* (1966) 240 Cal.App.2d 428, 430-433, 49 Cal.Rptr. 470). [120 Cal. Rptr. at 404].

Cf. United States v. *Kahan,* 415 U.S. 239 (1974).

In *Kastigar* this Court stated that "[t]he statutory [immunity] proscription is analogous to the Fifth Amendment requirement in cases of coerced confessions." (406 U.S. at 462). Statements made by a defendant in circumstances violating the strictures of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), are admissible for impeachment purposes if their "trustworthiness . . . satisfies legal standards. *Mincey* v. *Arizona*, —— U.S. ——, 98 S.Ct. 2408, 2416 (1978); *Oregon* v. *Hass, supra*, 420 U.S. at 224; *Harris* v. *New York, supra*, 401 U.S. at 224. While *Mincey* reiterated that any trial use of an *involuntary* confession is a denial of due process of law, it was alluding to the well settled holding that the Fourteenth Amendment forbids the use of involuntary confessions because of (1) the probable unreliability of confessions that are obtained in a manner deemed coercive; (2) the insistence upon putting the government to the task of proving guilt by means other than infringement of an individual's freedom of will by wringing a confession out of him; (3) "the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." *Blackburn* v. *Alabama*, 361 U.S. 199, 206-207 (1960); see *Jackson* v. *Denno*, 378 U.S. 368, 385-386 (1964); *Spano* v. *New York*, 360 U.S. 315, 320-321 (1959). As one commentator has explained:

> The rationale of *Harris* arguably applies to a defendant threatened with impeachment on the basis of prior statements compelled under a grant of 'use/derivative use' immunity. Clearly, such a defendant has no more right than the defendant in *Harris* to commit perjury at his trial. Although he is compelled to testify, as is the individual from whom a confession is involuntarily extracted, his testimony is not subject to the same degree of doubt as to its reliability since it is given under oath. Nor is the deterrence rationale appropos, for there can be no deterrence of illegality nonexistent in the first instance. Exclusion under the immunity grant is in essence a constitutionally mandated recognition by the state that, upon the grant of immunity, it will not unlawfully employ the incriminating testimony elicited to establish its criminal case against a witness. Comment, "The Fifth Amendment And Compelled Testimony: Practical Problems in the Wake of *Kastigar*," 19 Villanova L.R. 470, 483 (1974).

Petitioner submits that unlike a coerced confession, an accused's statement given under the grant of immunity is expected to be truthful, for the reasons to falsify have presumably been removed. If he lies under oath the accused will not be entitled to the benefits of immunity but will be subject to prosecution for perjury, false swearing or contempt. The State did not utilize abhorrent methods to wring a confession from the accused but at all times acted within the confines of the law. Moreover, the State had no intention of utilizing a coerced statement to prove its case. It simply urged permission to utilize the statements given after the grant of immunity solely for impeachment purposes if respondent deliberately attempted to obtain a false verdict by perjuring himself on the stand. None of the policy reasons behind the broad informal use immunity provided for coerced confessions by *Blackburn-Jackson-Miranda* require exclusion in this situation. See generally, Friendly, "The Fifth Amendment Tomorrow: The Case for Constitutional Change," 37 Univ. Cinn. L.R. 671, 679-698 (1968).

It is noteworthy that the statutory immunity grant in this case applied expressly to Mr. Portash's testimony

on November 14, 1974 before the State Grand Jury. The statute (N.J.S.A. 2A:81-17.2a2) by its very terms applies solely to testimony before "any court, grand jury or the State Commission of Investigation." When Mr. Portash was advised that he was being afforded immunity, the deputy attorney general stated:

> We have agreed that the testimony that Mr. Portash *is about to give before the Grand Jury,* under oath, that any adverse evidence derived therefrom shall not be used in any subsequent criminal prosecution against him, except for a prosecution for contempt, false swearing or perjury.
>
> No representations have been made insofar as prosecution for any offenses for which evidence has already been presented to a State Grand Jury—a separate Grand Jury from the one Mr. Portash is about to appear before. (A30) (emphasis added).

The substance of respondent's immunized State Grand Jury testimony was restricted for the most part to admission that the documents he had submitted under subpoena had been fabricated by him after the State Police commenced the investigation in 1972 (A34-1 to 43-1). Approximately two weeks after Mr. Portash's grand jury testimony, "charge bargaining" discussions were initiated to avoid the necessity of his indictment. (See A100). As a condition of holding off on his indictment, a statement was taken from respondent on February 5, 1975, in anticipation of his cooperation in Mr. Schmertz's trial, which was a prerequisite of the charge bargaining negotiations (A85 and 86; A90). There is no indication in the statement that it was given pursuant to statutory immunity. (See A58 to 76). Rather, the record merely reflects that the statement was voluntarily given by respondent in connection with the charge bargaining negotiations. It appears that there may have been an understanding that it would not be used by the State at trial in any substantive way.

In the February 5 statement Mr. Portash made more damaging admissions in addition to his grand jury testimony. These admissions in the later statement, in the State's view, may have been the underlying reason for respondent's motions before and at trial. The State in its case-in-chief had introduced independent evidence of the fabricated documents, which was the central focus of defendant's immunized State Grand Jury testimony. It would have been futile and unlikely for respondent to recant that testimony at trial, and it was not realistically anticipated by the State. Rather, respondent reveals one possible reason for his motions in both his Appellate Division brief (at p. IV) and his Brief in Opposition to Petition for Certiorari (at p. 6) where he states that "Had Mr. Portash been able to testify, he would have indicated that he had no knowledge of any connection between Leisure Technology and the Madison Agency at the time of his employment and indeed, *never* learned of the fact that Schmertz was an equal but silent partner during his employment" (emphasis added). In his statement of February 5, 1975, however, Mr. Portash admitted that he had first learned that Schmertz had an interest in Madison Agency about two weeks after he accepted the offer of employment (A59). Considering Mr. Portash's contact with Schmertz prior to that time, *e.g.* on municipal matters and on the bank board, even this latter admission may have understated his knowledge. The court could reasonably have concluded, however, that the testimony at trial was not inconsistent. This underscores the speculative nature of the requested ruling.

The statement of February 5, 1975 was the result of Mr. Portash's rational intellect and free will. He voluntarily entered into the charge bargaining negotiations as an intelligent choice between the alternatives then available to him. It was likewise a product of his free will that he withdrew his offer to cooperate at a later date and chose to defend against the charges. Applying the standards suggested in *Mincey* v. *Arizona, supra,* the statement of February 5, 1975 was not coerced with the threat of a contempt prosecution, its trustworthiness satisfied legal standards, and the statement was obtained in a legal manner. Accordingly, it is submitted that while inadmissible on the State's direct case, the statement should be admissible to impeach respondent's intended trial perjury. Use of the statement given pursuant to charge bargaining negotiations is quite distinguishable from the detrimental consequences of introducing a withdrawn guilty plea at trial. Compare *People* v. *Cole,* —— P.2d ——, 23 Cr.L. Reptr. 2355 (Supreme Court of Colorado, June 5, 1978) with *Kercheval* v. *United States,* 274 U.S. 220 (1927); *State* v. *Boone,* 66 N.J. 38, 327 A.2d 661 (1974); Fed. Rule Crim. Proc. 11(e)(6); Anno: "Propriety and Prejudicial Effect of Showing, In Criminal Case, Withdrawn Guilty Plea," 86 A.L.R.2d 326 (1962). For example, use of the charge bargaining statement would not be inconsistent with the privilege to seek withdrawal and annulment of a plea for all purposes, the statement would not have the conclusive effect of a guilty plea which would induce the jury to become reckless in its consideration of other evidence, and the statement should be regarded as inherently more trustworthy than a guilty plea which may have been prompted for reasons other than guilt. See, *e.g., Brady* v. *United States,* 397 U.S. 742 (1970).

It is evident that when respondent attempted to obtain an anticipatory evidentiary ruling from the trial court, it was faced with very difficult questions involving a number of statements, only one of which was given under a technical grant of statutory immunity. Since respondent had not yet testified, the court was faced with a myriad of abstract and hypothetical issues which cannot be properly decided in a vacuum. The record demonstrates that the court was cognizant of the appropriate standards and in all probability would have rendered the correct decision when the issue became ripe. In the meantime it correctly deferred its ruling and stated that it would handle the matter after respondent's direct testimony, out of the presence of the jury, and on a question-by-question basis. Petitioner advocates that it was permissible to utilize the immunized testimony if respondent had testified in an inconsistent fashion. However, even if petitioner was limited to utilizing false immunized testimony, a hearing on its admissibility did not have to be held until respondent took the stand on his own behalf. To mandate any other procedure would convert the shield of the privilege against self-incrimination which protects the liberty of individual citizens into a sword to destroy the integrity of the judicial system.

CONCLUSION

For these reasons, petitioner urges this Court to reverse the judgment of the Superior Court of New Jersey, Appellate Division and remand for reinstatement of the judgment of conviction and sentence.

Respectfully submitted,

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